Bloomberg BNA

Class Action Litigation Report®

CERTIFICATION

COLLECTIVE ACTIONS

The rationale for class certification under Fed. R. Civ. P. 23(f) also applies to an interlocutory appeal of the grant or denial of certification in a Fair Labor Standards Act collective action, yet these two approaches to mass litigation are treated differently on a procedural basis, attorney E. Travis Ramey says.

The author urges the Supreme Court to amend the rules to allow for permissive interlocutory review of a district court's decision to grant or deny a request to certify a collective action.

Permissive Interlocutory Appeals and Collective-Action Certification

By E. Travis Ramey

E. Travis Ramey is an attorney in the Birmingham, Ala., office of Burr & Forman, practicing in the firm's Appellate Practice Group. Ramey focuses his practice on litigating in state and federal appellate courts, and represents clients from a broad range of private-sector industries, including manufacturing, financial institutions, health care, insurance and real estate. He may be reached at tramey@burr.com

The most common form of representative mass litigation is, of course, the class action. But other forms exist. Close kin to the class action is the collective action, which is the representative-mass-litigation procedure available to parties litigating under the Fair Labor Standards Act (FLSA)[1] and the Age Discrimination in Employment Act (ADEA).[2]

Class actions and collective actions share some characteristics. Among those commonalities, the district court's decision on whether to certify the representative action is usually outcome determinative. That is, the parties typically martial most of their efforts in litigating the certification question. If the court grants certification, the case typically settles favorably to the plaintiff. If the court denies certification, the matter typically goes away.

There are also, however, some differences between class actions and collective actions. The certification

[1] *See* 29 U.S.C. § 216(b). The FLSA governs wage-and-hour issues, and the number of claims filed under that statute appears to be at an all-time high. According to the Administrative Office of the U.S. Courts, there are over 8,000 FLSA claims pending in federal district courts.

[2] *See* 29 U.S.C. § 626(b). The ADEA generally prohibits employment discrimination against people 40 years of age or older.

 ISSN 1529-0115

procedures are different. The named plaintiff's ability to represent unnamed parties is somewhat different. And, importantly, federal class actions are governed by Federal Rule of Civil Procedure 23, but collective actions are governed by 29 U.S.C. § 216(b).

After the 1998 amendments to Rule 23, that last distinction results in class-action parties having a significant procedural advantage over collective-action parties. Under Rule 23(f), class-action parties may seek interlocutory review of the class-certification decision. Collective-action parties may not.

Other than the pure happenstance that collective actions are not governed by Rule 23, there appears to be no good reason for the different treatment. The same rationale that led to the creation of Rule 23(f) also applies to collective actions. Therefore, the U.S. Supreme Court should adopt a new procedural rule allowing for permissive interlocutory review of collective-action-certification decisions.

A Brief Look at Class Action and Collective Action Certification

The quintessential representative mass litigation is the class action. In a class action, at least one named plaintiff files a claim on behalf of a putative class. Rule 23 defines the prerequisites for class certification and the three basic types of class actions. As soon as is practicable, the district court must decide whether to certify the class. If it does, the court must define the class and appoint class counsel. It also may (and sometimes must) give notice to the class members. Members of the certified class are presumptively bound by the litigation, but members of a Rule 23(b)(3) class may opt out.

Collective actions proceed somewhat differently. They begin in much the same way: At least one named plaintiff files a claim on behalf of a putative class of employees. Courts then commonly use a multi-step process to determine whether the putative class of employees are ''similarly situated'' so that the case should proceed as a collective action.

First, the district court decides (based upon only the pleadings and any affidavits) whether the members of the class appear to be similarly situated. It imposes a low burden at this stage, generally requiring the named plaintiff to show only that the potential class members share common questions of fact. If the court decides to conditionally certify the collective action class, the plaintiff sends notice to potential members of the class. Those potential members then may *opt in* to the collective action. Those who do not opt in are not bound by the litigation.

After the period for opting in has ended, defendants typically file a motion to decertify the collective action class. At that point, discovery is often close to completion, and the parties have more detailed information about the collective-action class members. Because the district court has better information on which to base a final certification decision, it applies a heavier burden when considering whether the employees are similarly situated. If it concludes they are, the named plaintiff may continue to litigate on behalf of the collective-action class. If it concludes the employees are not similarly situated, the court decertifies the class.[3]

The Adoption of Rule 23(f)

Rule 23 was adopted in 1937. As early as 1970, legal commentators began calling for amendments to the Rule to allow for interlocutory appeal of class-certification decisions, citing the need for greater appellate review.[4] That discussion culminated in the 1990s with proposals for a new procedural rule that would allow interlocutory appeal from decisions granting or denying class certification.[5] In 1998, using its power under 28 U.S.C. § 1292(e), the Supreme Court amended Rule 23 and created subdivision (f). Rule 23(f) provides for permissive appeals of class-certification decisions.

The advisory committee justified this exception to the final judgment rule on the following basis:

> [S]everal concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.[6]

Thus, the committee recognized that in class-action litigation, the class certification decision often functionally terminated the case. If a district court denied class certification, the named plaintiff may have little incentive to proceed. If a district court granted class certification, the defendant was often compelled to settle. Although not mentioned by the committee, the lack of immediate appeal had also resulted in a lack of appellate decisions resolving class-certification issues. The committee went on to state that its concerns could be dealt with ''at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.''[7]

The Reasons for Adopting Rule 23(f) Also Apply to Collective-Action Certification

Since 1998, the courts of appeals have made clear that there is no interlocutory appeal from collective-action-certification decisions.[8] They are not final judgments under 28 U.S.C. § 1291.[9] They are not collateral

---

[3] At that point, district courts typically dismiss the former opt-in plaintiffs' claims without prejudice. Some courts, however, have chosen to sever former opt-in plaintiffs into individual actions.

[4] *See generally* Note, *Interlocutory Appeal From Orders Striking Class Action Allegations*, 70 *Colum. L. Rev.* 1292 (1970).

[5] *See* Proposed Rules, 167 F.R.D. 523, 540–41 (1997); Jordon L. Kruse, *Appealability of Class Certification Orders: The 'Mandamus Appeal' and a Proposal to Amend Rule 23*, 91 Nw. U. L. Rev. 704, 734–39 (1997).

[6] *Fed. R. Civ. P.* 23 cmt. (1998).

[7] *Fed. R. Civ. P.* 23 cmt. (1998).

[8] This is true for the district court's decisions at both the conditional-certification stage and the decertification stage.

[9] *See Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245 (3d Cir. 2013); *McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1139 (9th Cir. 2007); *Baldridge v. SBC Commc'ns,*

   ISSN 1529-0115

orders appealable under *Cohen v. Beneficial Industrial Loan Corp.*[10] Courts have also declined to review them via mandamus petitions.[11] Instead, collective-action-certification decisions are reviewable only after final judgment or under the certification procedure created by 28 U.S.C. § 1292(b).[12] The result has been to make the collective action (at least for purposes of appellate review) something of a second-class citizen.

Looking at the rationale underlying Rule 23(f), there is little justification for the less favorable treatment of collective actions. As in class actions, when a district court denies collective-action certification or decertifies a collective-action class, the plaintiff is left with two bad choices: (1) litigate an individual claim that, standing alone, may not be worth the costs of litigation to gain appellate review[13] or (2) abandon the collective action.[14] And, as in class actions, when a district court grants collective-action certification and refuses to decertify, the defendant is left with two bad choices: settle or expose itself to ''potentially ruinous liability.''[15]

The functional result has been exactly what the committee implicitly realized was true for class actions. In collective-action litigation, the class-certification decision often functionally terminates the case. If the district court denies conditional certification or decertifies the collective action, the named plaintiff settles or, along with the opt-in plaintiffs, simply melts away. If the district court grants conditional certification and denies decertification, employers are basically compelled to settle the claims. This reality has had a detrimental effect on the development of standards for collective-action certification. Because few cases proceed to final judgment, there are relatively few appellate decisions conclusively resolving important collective-action-certification issues.

Interlocutory Appeals for Collective Actions

The federal courts have a long standing bias in favor of a single appeal of all issues after final judgment. Nevertheless, in 29 U.S.C. § 1292(e), Congress ceded power to the Supreme Court to create exceptions to the final-judgment rule and allow interlocutory appeals. The Supreme Court has done so for class actions by adopting Rule 23(f), which provides an exception for class-action-certification decisions because, although interlocutory, they are typically outcome determinative. Although not governed by Rule 23, collective-action-certification decisions are also typically outcome determinative. The same reasons that justified Rule 23(f) also justify interlocutory appeal of the grant or denial of collective-action certification.

Permissive interlocutory review would allow the courts of appeals to resolve important questions about collective-action certification without being unduly burdened by additional routine cases. The power to accept interlocutory appeals would foster development of definitive standards for district courts to make collective-action-certification decisions. Over time, the development of definitive standards would reduce the need for the courts of appeals to accept interlocutory appeals.

Therefore, the Supreme Court should amend the Federal Rules of Civil Procedure to allow for permissive interlocutory review of a district court's decision to grant or deny a request to certify a collective action.

Inc., 404 F.3d 930, 931 (5th Cir. 2005); *Lusardi v. Xerox Corp.,* 747 F.2d 174, 176 (3d Cir. 1984).

[10] *See Killion v. KeHe Distributors, LLC,* 761 F.3d 574, 589 (6th Cir. 2014); *McElmurry,* 495 F.3d at 1139–40; *Comer v. Wal-Mart Stores, Inc.,* 454 F.3d 544, 548–49 (6th Cir. 2006); *Baldridge,* 404 F.3d at 931–32; *Lusardi,* 747 F.2d at 176–79.

[11] *See McElmurry,* 495 F.3d at 1142; *Lusardi v. Lechner,* 855 F.2d 1062, 1064 (3d Cir. 1088); *see also In re HCR ManorCare, Inc.,* No. 11-3866 (6th Cir. Sept. 28, 2011) (unpublished).

[12] *See, e.g., Hoffman-LaRoche Inc. v. Sperling,* 493 U.S. 165, 169, 110 S. Ct. 482, 485–86 (1989); *Sandoz v. Cingular Wireless LLC,* 553 F.3d 913, 915 (5th Cir. 2008).

[13] This choice is made, perhaps, a little better by the FLSA's and ADEA's provisions awarding attorney's fees to a prevailing plaintiff. *See* 29 U.S.C. § § 216(b), 626(b).

[14] *See Fed. R. Civ. P.* 23 cmt. (1998).

[15] *Id.*